INDEX.

CITATIONS.

Cases:

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS, plaintiff in error, *v.* STATE OF MISSOURI AT THE INFORMATION of Jesse W. Barrett, Attorney General.	No. 252.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT OF THE CASE.

By permission of the Court, this brief is filed by the United States as *amicus curiae*.

Its interest in the litigation is obvious. The case not only affects the true construction of an important Federal statute, but involves the integrity of the national banking system.

If the State of Missouri has the right to institute this proceeding to restrain an alleged excess of power by a Federal instrumentality, then every constituent State of the Union has a like visitatorial power, and in that event the national banking system of the

United States is subject not alone to one master, but to forty-nine.

The United States, therefore, intervenes to assert the immunity of one of its fiscal instrumentalities from State supervision or regulation.

When this Court ordered a reargument and directed the attention of counsel to the question of the right of the State of Missouri to institute the proceeding, it seemed incumbent upon the Federal Government to assert its right to regulate and control its own fiscal instrumentality.

Hence, this brief.

This was an original proceeding in *quo warranto*, instituted by the Attorney General of Missouri in the Supreme Court of that State, to determine the authority of a national bank engaged in business in the city of St. Louis to establish and conduct a branch at another than its regular place of business in that city.

On February 25, 1863, an Act of Congress was approved under the title of "An Act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof." (12 Stat. 665.) Since that time Congress has passed many supplemental and amendatory statutes, and these statutes are, under the Act of June 20, 1874 (18 Stat. 123), called "The National Bank Act."

This act vests in the Comptroller of the Currency power to supervise all the operations of national banks.

Under its provisions he is specifically authorized to bring suit in the United States courts for the forfeiture of the charter of any national bank which violates any provision of the National Bank Act and thus acts in excess of its corporate powers. (Sec. 5239, Revised Statutes, U. S.) He is empowered to regularly examine such banks for the purpose of determining whether their operations are conducted according to law. (Sec. 5240, Revised Statutes, U. S.) After authorizing such examinations, Section 5240 (as amended by Section 21 of the Federal Reserve Act, 38 Stat. 271) provides that—

> No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either house thereof or by any committee of Congress, or of either house duly authorized.

Giving to this language its usual or ordinary interpretation, it seems clear that Congress intended that the Comptroller of the Currency should have the "visitatorial" power to enforce a proper observance of the provisions of the National Bank Act. It clearly intended that the sole master of the national banking system should be the Sovereign which had created it.

As applied to charities, the language "visitatorial power" has been defined by the courts as—

> A mere power to control and arrest abuse and to enforce a due observance of the stat-

> utes of the charity * * *. *Allen* v. *McKean*, 1 Fed. Cases No. 229, p. 498; 1 Sumn. 276, 300.

While this expression, as used in the National Bank Act, does not appear to have been defined by this Court, the provisions quoted were obviously intended to prevent other agencies than those mentioned from seeking to control the operations of national banks. The proceedings instituted by the Attorney General of Missouri are an obvious attempt to exercise visitatorial powers over the operations of such banks.

This action of the Attorney General and of the trial court therefore constitute a violation of these specific provisions of acts of Congress, unless the Supreme Court of Missouri inherently has jurisdiction to try cases of this sort or unless Congress has vested it with such jurisdiction.

ARGUMENT.

I.

Want of Jurisdiction of the Trial Court.

The Supreme Court of Missouri apparently assumed jurisdiction in this case on two grounds:

(1) Under its interpretation of the National Bank Act, based upon the "customary rules of construction," the establishment and operation of a branch bank constituted at least an *ultra vires* act on the part of the respondent bank. On this point the court below said (R. 16):

> This is not a proceeding to deprive the respondent of any right or limit the exercise

> of any power conferred upon it by the *laws of the United States*; but to prevent it from committing an act in violation under the established rules of construction, of the laws of its creation * * *. (Italics ours.)

The Supreme Court of Missouri thus assumed the right to determine the extent of powers vested in national banks by the laws of the United States and to prohibit the exercise of any power which, in the opinion of the court, was not vested in the respondent bank.

If this is not an exercise of visitatorial power, what is it?

(2) Jurisdiction was also assumed on the ground that the exercise of the power in question expressly contravenes a State statute and that this State statute was not in conflict with the express terms of any act of Congress.

If this is not an attempt by a State to regulate a Federal instrumentality by the laws of the State, what is it?

The United States alone may inquire by Quo Warranto whether a National Bank, in operating as such, has acted in excess of its corporate powers.

It is not questioned in this proceeding that the First National Bank in St. Louis is a duly incorporated national bank and, as such, a fiscal instrumentality of the Federal Government. If a bank attempted to do business under the claim that it was a national bank, and the State of Missouri could show that, as a matter of fact, such a bank was

never incorporated by the Federal Government, and, as a Federal instrumentality, had no existence, then the fact that such pretended institution was transacting business within the State of Missouri would give that State full power to determine by what authority it was attempting to function as a corporate entity.

Such is not this case; for the information concedes the due incorporation of the bank in question, and only challenges its right to do certain corporate acts.

While an ouster is prayed for, yet none was asked and none was given as against the corporate entity. What was attempted was to restrain by a pretended ouster a Federal instrumentality from operating its branches in the State of Missouri, and the relief granted was essentially an injunction, which sought to restrain the bank from maintaining certain branch offices in the State of Missouri.

The court first granted a temporary restraining order, in the teeth of Section 5242 of the Revised Statutes, which provides that—

> no attachment, *injunction* or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (Italics ours.)

The distinction between a pretended corporation which has no corporate franchise and a legal corporation which misuses such franchise is, in a proceeding of this character, a clear one; for the power

to restrain the abuse of a corporate privilege is essentially visitatorial, and, to subject a Federal instrumentality to the visitatorial powers of a State is to subject a Federal instrumentality to the rule of two masters—and this our system of government forbids. If it did not, it would perish.

No other case has come to our attention wherein one sovereign has successfully attempted by *quo warranto* in its own courts to define the limits of a franchise granted by another. Certainly the case of *Standard Oil Company* v. *Missouri*, 224 U. S. 270, relied upon by the Supreme Court of Missouri, is not a precedent. This and others which might be cited are authority for the obvious proposition that a state may inquire whether a foreign corporation, not a Federal instrumentality, is lawfully exercising within its boundaries the right and privilege of doing business there. This is clearly within its jurisdiction. Since *Bank of Augusta* v. *Earle*, 13 Pet. 519, it has been settled that a foreign corporation, having no Federal right to transact business in a State, can only do so with the express or implied sanction of such State and under such reasonable and nondiscriminatory regulations as it may see fit to enact. Accordingly, it is within the province of the State to inquire at any time whether the privilege voluntarily accorded by it to a foreign corporation is being abused or misused. But this bank is not in Missouri by the grace of that State. It is there by the paramount authority of the United States. Concededly the First National Bank in St. Louis has been created

as an instrumentality of the Federal government to carry out, within the territorial limits of the United States, a power constitutionally vested in the national government. (*McCulloch* v. *Maryland*, 4 Wheat. 316.) It holds no franchise from the State of Missouri. It needs none. It is there not by sufferance, license, or franchise from the State of Missouri, but by virtue of a franchise granted by the United States. It has power to exercise its franchises in Missouri, not because of any permission obtained from the State but because Missouri is within the territorial limits of the United States.

We believe that the learned Attorney General of Missouri would agree that no other State by a proceeding in *quo warranto* in its courts could render a valid judgment fixing the limits of a franchise to be exercised by a Missouri corporation within the State of Missouri. And by the same token it can not render a valid judgment fixing the limits of the franchises of a Federal corporation.

The ancient writ of *quo warranto* was a high prerogative writ in the nature of a writ of right for the Sovereign, against one who usurped or claimed any office, franchise, or liberty of the Crown, to inquire by what authority he claimed the right. (3 Blackstone, 262; High on Extraordinary Legal Remedies, 3d Edition, p. 544.)

A franchise or liberty was defined as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of the subject." (2 Blackstone, 37.) The Sovereign alone might inquire who should hold it, how

it should be exercised, when its limits had been exceeded, or when its exercise had been abandoned. By the theory of the feudal law the king was the fountain whence all franchises or governmental prerogatives were derived, and the exercise by a corporation or an individual of any of these prerogatives, without a grant from the king, was necessarily a usurpation of a prerogative of the Sovereign.

The ancient writ was a purely civil proceeding. In course of time it was superseded by the speedier remedy of an information in the nature of *quo warranto*. (*Territory* v. *Lockwood*, 3 Wall. 236, 238.) This proceeding was criminal in character and led to judgment, not only of ouster, but of a fine for the usurpation. (*Standard Oil Company* v. *Missouri*, 224 U. S. 270, 283.) In either proceeding, however, the king was the person aggrieved, and it was upon his initiative that the actions were begun. Accordingly, both by reason of the old feudal theory that all prerogatives belonged to the king, and by reason of the theory still prevailing that crimes are offenses against the Sovereign and to be prosecuted as such, the king as head of the government was viewed as the sole party interested in the prosecution of the remedies by *quo warranto*.

The legal history of the development of these remedies is curious and interesting. It shows that the various statutes passed by Parliament to regulate its use have been designed as limitations upon the powers of the king and not for the purpose of afford-

ing to the subject a remedial writ whereby he might obtain some right which belonged to him or redress some injury suffered. Lord Coke tells us, 2d Inst. 277–280, that prior to the Statute of Gloucester, 6 Edw. 1 (1278), some evil counsellors persuaded the king, who was in need of money, that he might obtain all that he required by the simple expedient of forfeiting all royal franchises where the holders could not produce evidence of the original grant. The royal proclamation was accordingly issued directing all who held such franchises to appear before the king's commissioners appointed for the purpose and to submit such evidence of their original grants as they might have. In all cases where sufficient evidence was not produced the king forfeited the franchises and granted them to others upon such consideration as he chose. The manifest injustice of this proceeding occasioned the Statute of Glocester, which restrained the power of the Crown so that franchises might be forfeited only after a judicial proceeding.

The history of the writ from that day until modern times is closely intertwined with the long struggle between the Crown and the people. During the reigns of the later Stuarts, when the judiciary were quite subservient to the Crown, the writ was used to obtain control of the municipalities of the kingdom. To such an extent was the jurisdiction carried that in the celebrated case of the City of London the entire liberties, privileges, and franchises of that great city were seized by the king, where they remained for a period of

four years, until James II, becoming terrified at the threatened invasion of the Prince of Orange, saw fit to restore the charter. By subsequent Act of Parliament it was provided that the charter of the City of London could not for any cause be forfeited.

Notwithstanding the experience which Parliament and the people had through many centuries of the use of this prerogative writ, and notwithstanding many efforts by statute to limit the use of it, we find no legislation which places in the hands of anyone other than the sovereign the right to initiate proceedings in *quo warranto* to try the exercise of public franchises.

When our Republic was formed with a dual sovereignty, the nation and the constituent States, each in their respective spheres, succeeded to this prerogative of the Crown.

The question as to what authority may inquire into the exercise of a Federal office or franchise is not entirely new in this Court. In *Wallace* v. *Anderson*, 5 Wheat. 291, this Court held that the right to hold a Federal office could be questioned only in an action begun in the name of the United States. In *Territory* v. *Lockwood*, 3 Wall. 236, it was held that the Territory of Nebraska had no right by a proceeding in *quo warranto* to test the right of a person to exercise the functions of a judge of the Supreme Court of the Territory. The Court said (page 240):

> the subject is as much beyond the sphere of its authority as it is beyond the authority of the states as to Federal officers whose duties are

> to be discharged within their respective limits. The right to institute such proceedings is inherently in the government of the nation. We do not find that it has been delegated to the Territory.

A similar question was presented to the Supreme Court of Connecticut shortly after the enactment of the National Bank Act, and in an opinion of unusual clarity and strength that court held that an information in the nature of a *quo warranto* would not lie in a State court to try the right to the office of director in a National Bank. (*State* v. *Curtis*, 35 Conn. 374.)

The reasoning of these opinions seems clearly applicable to the case at bar and conclusive upon the question of the power of the State of Missouri.

Indeed, no other authority for our contention seems to be required in addition to the great decision in *McCulloch* v. *Maryland*. It said the first and almost the last word on this fateful subject. The great Chief Justice apparently exhausted the reasoning in such a case and established forever the immunity of federal instrumentalities from State interference or attack.

National banks organized under the National Bank Act are instruments designed to be used to aid the Federal government in the administration of its powers. As was said in *Davis* v. *Elmira Savings Bank* (161 U. S. 275, 283):

> National banks are instrumentalities of the Federal government, created for a public

purpose, and as such necessarily subject to the paramount authority of the United States.

This is the only warrant for their creation by Congress. (*McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738.)

A State court can not impede or suspend the operation of a Federal instrumentality upon the ground that the act of Congress under which the Federal instrumentality is operating is unconstitutional, nor does it confer the power now sought to be exercised, for the reason that it is not within the power of the State to stay the operations of the Federal government. This principle has been recognized and enforced in a long line of cases in which states have undertaken to interfere with Federal officers and instrumentalities in the discharge of duties which were being exercised under Federal statutes, or even under the color thereof.

One of the leading cases on this subject is *Ableman* v. *Booth* (21 How. 506). In that case the Supreme Court of Wisconsin held that the fugitive slave law was unconstitutional and discharged a prisoner held under a warrant issued by a United States Commissioner for aiding and abetting the escape of a fugitive slave, and also discharged the same person from confinement after indictment and conviction in the United States District Court. This judgment of the Supreme Court of Wisconsin was reversed by this Court.

The same question was presented in *Tarble's Case* (13 Wall. 397), where a soldier in the United States

Army was discharged on habeas corpus by a Supreme Court Commissioner of the State of Wisconsin on the ground that he had been unlawfully enlisted while a minor without the consent of his guardian.

In both cases the courts of the State were declared by the Supreme Court of the United States to have been without jurisdiction.

It is uniformly recognized that the courts of a State possess no jurisdiction to pass upon the constitutionality or construction of a United States statute or treaty in such a way as to paralyze the performance of a duty enjoined by such statute upon a United States official. The limit of power is reached the moment the hand of the State is laid in restraint of a Federal agency, because the judicial control of the agency is within the exclusive jurisdiction of the Federal Government. This is fundamental in our dual system of government in which the Constitution and laws of the United States and treaties made under its authority are the supreme law of the land. The principle is clearly stated in *Tennessee* v. *Davis* (100 U. S. 257), as follows (pp. 262, 263):

> "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the

> state, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the state court, the operations of the general government may at any time be arrested at the will of one of its members. * * *
>
> We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in a number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

It follows from what has been said that a State court can not hear and determine the question whether the laws of the United States justify the performance of an act by a Federal agency. If it could do so, it could in this way exercise a paramount power and frustrate, at least temporarily, the lawful activities of the Federal government.

Many cases have arisen where persons held by the state authorities have been discharged by the Federal courts or judges on the ground that the act complained of was done under authority of the United

States or the process of its courts, and that the State court was, therefore, without jurisdiction. (*In re Neagle* (1890), 135 U. S. 1; *United States* v. *Fullhart* (1891), 47 Fed. 802; *Ex parte Conway* (1891), 48 Fed. 77; *Kelly* v. *State of Georgia* (1895), 68 Fed. 652; *In re Waite* (1897), 81 Fed. 359; affirmed C. C. A. 1898, 88 Fed. 102; *In re Lewis* (1897), 83 Fed. 159; *In re Thomas* (1897), 82 Fed. 304; affirmed C. C. A. 1898, 87 Fed. 453; (1899) 173 U. S. 276; *In re Weeks* (1897), 82 Fed. 729; *In re Comingore* (1899) 96 Fed. 552; affirmed (1900) 177 U. S. 459; *In re Fair* (1900), 100 Fed. 149; *Anderson* v. *Elliott* (1900), 101 Fed. 609; *United States* v. *Fuellhart* (1901), 106 Fed. 911; *In re Turner* (1902), 119 Fed. 231; *In re Matthews* (1902), 122 Fed. 248; *In re Laing* (1903), 127 Fed. 213; *Ex parte Gillette* (1907), 156 Fed. 65; *Drury* v. *Lewis* (1906), 200 U. S. 1; *Hunter* v. *Wood* (1908), 209 U. S. 205; *Pundt* v. *Pendleton* (1909), 167 Fed. 997.)

A notable case is *Ohio* v. *Thomas* (173 U. S. 276), where the governor of a soldiers' home was arrested for violating the State law of Ohio in the use of oleomargarine. The Court said (p. 284):

> Assuming, in accordance with the decision of the state court, that the act of the Ohio legislature applies in terms to the soldiers' home at Dayton, in that State, we are of opinion that the governor was not subject to that law and the court had no jurisdiction to hear or determine the criminal prosecution in question, because the act complained of was performed as part of the duty of the governor as a Federal officer in and by virtue of valid Federal

> authority, and in the performance of that duty he was not subject to the direction or control of the legislature of Ohio.

The principle for which I contend clearly applies to national banks as Federal agencies as well as to officers of the United States. As a matter of fact it was applied by this Court to banking institutions acting as fiscal agents of the Government at an early period of our national history and has been consistently recognized as applicable to such institutions since that time.

In the leading case of *McCulloch* v. *Maryland* (4 Wheat. 316) the first Bank of the United States had established a branch in the State of Maryland. The legislature of that State by an act passed February 11, 1818, imposed a tax on all banks or branches thereof in the State of Maryland not chartered by the legislature. In dealing with the right of the Maryland legislature to impose this tax the court stated, *inter alia:*

> The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. * * *
>
> The court has bestowed on this subject its most deliberate consideration. *The result is a conviction that the states have no power, by*

> *taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.* This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared. (Italics ours.)

Conceding the principle, so clearly and finally established in *McCulloch* v. *Maryland*, that the legislature of a state can not define the duties of national banks or control their affairs, it would follow that inasmuch as Congress has defined the duties and powers of national banks, has prescribed penalties for violation of the laws of the United States, and has vested in an officer of the United States the power to see that such laws are duly observed, any attempt on the part of the courts or officers of the state to control the exercise of national banking powers would be an assumption of power not vested in a State or any agency thereof in the absence of express authority from Congress.

Congress has vested no power in the State Courts by Quo Warranto or other proceedings to control the operations of National Banks. On the contrary, it has expressly forbidden it.

The instances in which and the extent to which national banks are subject to the jurisdiction of State courts are governed by the Act of July 12, 1882, Chap. 290, Sec. 4, 22 Stat. 163, and by the Act of August 13, 1888, Chap. 866, Sec. 4, 25 Stat. 436.

ACT OF 1882.

The Act of July 12, 1882, provides in part that—

> The jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, *except suits between them and the United States, or its officers and agents,* shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun * * *.

It will be observed that this statute expressly excludes from its operation suits between national banks and the United States or its officers and agents. As we have already seen Congress has specifically provided for suits to be brought by the Comptroller of the Currency against national banks violating any of the provisions of the National Bank Act and designated the United States Courts as the proper forum for the trial of such suits.

Section 5239, Revised Statutes of the United States, provides in terms that —

> If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation

> shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, *in a suit brought for that purpose by the Comptroller of the Currency*, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation. (Italics ours.)

It will be noted that this section not only specifies the court in which suit is to be brought but expressly provides the penalties for the violation of the provisions of the National Bank Act, namely, forfeiture of the charter of the bank and responsibility of the directors for the losses sustained.

If the State courts are without jurisdiction to try suits instituted by an officer of the United States who is specifically vested with power to enforce compliance with the National Bank Act, *a fortiori*, they are without power to try such suits when instituted by state officials who have no authority from Congress to exercise such visitatorial powers,

ACT OF 1888.

The Act of August 13, 1888, provides in part that (25 Stat. 436)—

> All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them,

> real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.
>
> The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

Here again the statute expressly reserves to the United States courts jurisdiction to try suits brought by the United States or by the direction of any officer thereof or suits for the winding up of the affairs of a national bank. It extends jurisdiction to the State courts only in those cases where the court would have jurisdiction as between two of its citizens. (*Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778.)

Whenever an individual can sue in a State or Federal court, a national bank can do the same thing, and whenever the Federal courts are not open to individuals, neither are they open to national banks. (*Petri* v. *Commercial Bank.*, 142 U. S. 644; *Guthrie* v. *Harkness*, 199 U. S. 148.)

It can hardly be contended that either of these statutes vests in the State courts the right to try suits brought against national banks which Section 5239, Revised Statutes of the United States, expressly provides shall be brought by the Comptroller of the Currency in the United States courts.

Assuming, therefore, that State courts are without the inherent power to enjoin a national bank from exercising a power claimed under a Federal statute and that Congress has not expressly authorized State courts to exercise this power, the question remains whether any State law can constitutionally vest this authority in the State courts. This brings us to a consideration of the statutes of Missouri which the lower court has held have been violated by the establishment of a branch bank.

Alleged Contravention of State Law.

The Supreme Court of Missouri calls attention to the fact that Missouri banking business can be conducted only by a corporation; that thus organized the extent of its power must be determined by the statute of its creation; and, continuing, states that (R. 14–15)—

> The state banking act gives express recognition to this rule in providing that banks, whether incorporated under Federal or State law, can transact only such business as is permitted by the laws of the United States or of the state. (Sec. 11684, Mo. R. S. 1919.)

Continuing, the court says (R. 15):

> Branch banks, not having been permitted by the state law either by express terms or necessary implication, the well-recognized canon of construction will authorize the exclusion of this power from those granted. Reliance upon this rule is, however, unnecessary in the presence of a subsequent section (Sec. 11737,

> R. S. 1919) in which it is provided "That no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house." The attempt, therefore, of the respondent to establish a branch bank is not only an act in excess of its corporate powers but in violation of an express statute.

Considering first Section 11684, Missouri Revised Statutes, 1919, *supra*, which provides that banks, whether incorporated under Federal or State law, can transact only such business as is permitted by the laws of the United States or the State, it is conceded that national banks can exercise only such powers and transact only such business as permitted by the laws of the United States. For this violation, however, as we have already seen, Congress has prescribed specific penalties and has authorized the Comptroller of the Currency to bring suit in the United States courts to determine whether a given bank is guilty of such violation. The determination of the fact of such violation and the appropriate remedy is for the Federal Government in a suit by the Comptroller.

This being true, this limitation of the State law, if it can be fairly construed as an applicable limitation, is of no practical effect. In other words, if the State law prescribes a penalty for the exercise of any power by a national bank which is not authorized by the laws of the United States, it is entirely clear under the decisions of the courts that the national bank would not be subject to such penalty.

Section 5197, Revised Statutes of the United States, limits the rate of interest that may be charged by a national bank to that permitted by the State in which it is located but prescribes a specific penalty for the violation of this provision. In the case of *Farmers National Bank* v. *Dearing*, 91 U. S. 29, an attempt was made to subject a national bank to the penalty prescribed by a State law for charging a rate of interest in excess of that permitted under the State law. The State of New York fixed as a penalty forfeiture of the entire debt, whereas Section 5197, Revised Statutes of the United States, provides for the forfeiture of interest only. The court held that the penalty prescribed by the State law could not be applied, but the bank was subject only to the penalty prescribed by Section 5197, Revised Statutes of the United States.

The same principle is here involved. A national bank, exercising a power it is not authorized by the laws of the United States to exercise, is guilty of a violation of the laws of the United States. If Section 11684, which in terms prohibits national banks from exercising any powers not authorized by any laws of the United States, can be said in any case to apply to national banks, the State courts are without power to enforce any penalties that may be provided by the State law under the decision in the case of *Farmers National Bank* v. *Dearing*, *supra*. Furthermore, under the principles laid down by this Court, in the absence of any Federal statute

authorizing the States to limit or control the operations of national banks, the Missouri statute under consideration is, as applied to national banks, a legal nullity, since it has been consistently held that such statutes have no application to national banks without the aid of a Federal statute making them applicable. (*Haseltine* v. *Central Bank of Springfield*, 183 U. S. 132; *Schuyler National Bank* v. *Gadsden*, 191 U. S. 451.)

From what has been said it necessarily follows that this statute can not be construed as vesting in the state courts the right to determine whether any business transacted by a national bank constitutes a violation of law. Such a construction would bring it in direct conflict with Section 5239, Revised Statutes of the United States, *supra*, which vests this power in the Comptroller of the Currency to be exercised by suit in a United States court.

SECTION 11737, MISSOURI REVISED STATUTES, 1919.

This section, which is likewise quoted by the lower court, provides in terms—

> That no bank shall maintain in this State a branch bank or receive deposits or pay checks, except in its own banking house.

Under the decisions already referred to this State law can have no application to national banks in the absence of a Federal statute authorizing the State legislature to exercise this control over the operations of national banks. This proposition was fully considered in the case of *Farmers National Bank* v.

Dearing, supra. In that case, after quoting from *McCulloch* v. *Maryland* and *Osborn* v. *United States Bank, supra*, and after holding that national banks were instruments designed to be used to aid the government in the administration of an important branch of the public service, the court said (91 U. S. 33, 34):

> They are a means appropriate to that end. * * * Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State can not give."

Decision of the Lower Court.

The decision of the lower court is predicated upon the assumption that the State statute which prohibits banks from operating branches does not impair the efficiency of national banks and does not conflict with any Federal statute.

From the reasoning of the court it would seem that if the National Bank Act in terms authorized national banks to operate branches, the State law prohibiting the operation of branches would have no application. But having first undertaken to construe the National Bank Act and to determine whether such law authorizes national banks to operate branches, the court, concluding that no

such authority exists, then holds that the State law prohibiting branches is not in conflict with any Federal statute and that the State has a right to apply this statute to national banks.

With deference I submit that this reasoning of the court is not only unconvincing but "begs the question." If it has inherent jurisdiction to determine what powers may be exercised by a national bank, or if it is vested with this jurisdiction by Congress, and in the exercise of this right the court finds that national banks have no power under the laws of their creation to establish and operate branches, it is immaterial whether the operation of such branches violates any State law. On the other hand, if the State courts are without jurisdiction to determine what powers may be exercised by national banks, the mere fact that the exercise of a given power may be inconsistent with a State statute does not give the court jurisdiction to determine what powers they may legally exercise.

The present status of this case illustrates what seems to be the fallacy of the position of the lower court on this point. The question now before the Court for reargument is not whether national banks are authorized by law to establish branches, but whether the lower court had jurisdiction to determine this question. If, however, the reasoning of the lower court is to be followed and its jurisdiction sustained on the ground that the establishment

of a branch by a national bank contravenes a State statute, it will be necessary for this Court first to determine that a national bank is without power to establish such a branch, since otherwise the State statute contravened will be in conflict with a Federal statute and hence of no effect.

In support of its position that the Missouri statutes here involved may be held to apply to national banks, the lower court relies primarily on the decisions of this court in the case of *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, and *McClellan* v. *Chipman*, 164 U. S. 347. An analysis of these cases shows that neither is applicable to the case under consideration.

In *Davis* v. *Elmira Savings Bank* the question involved was one of conflict between the National Bank Act and a State statute. The National Bank Act directed the Comptroller of the Currency in winding up the affairs of an insolvent national bank "from time to time after full provision has been made for the refunding to the United States of any deficiency in redeeming the notes of such association * * *" to make a ratable dividend of the money paid over to him on all such claims as may have been proved. The New York statute directed the trustee, assignee, or receiver of "any bank or trust company which shall become insolvent to apply the assets received by him in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank but not to an amount exceeding that authorized" by law.

Mr. Justice White, delivering the opinion of the court, said (161 U. S. 283):

> The question which the record presents is, does the law of the State of New York on which the savings bank relies conflict with the law of the United States upon which the Comptroller of the Currency rests to sustain his refusal? If there be no conflict, the two laws can coexist and be harmoniously enforced, but if the conflict arises the law of New York is, from the nature of things, in operative and void as against the dominant authority of the Federal statute.

The court held that there was a direct conflict and that the Federal statute was supreme.

In *McClellan* v. *Chipman*, a customer of a national bank to secure a preexisting debt had mortgaged real estate to the bank. A short time thereafter the debtor of the bank was adjudged to be insolvent under the insolvency laws of the State of Massachusetts. A Massachusetts statute provided in effect that if a person insolvent or in contemplation of insolvency made a conveyance of this sort for the purpose of preferring the creditor such a conveyance should be void.

Section 5137, Revised Statutes, U. S. (part of the National Bank Act), provides in part that—

> A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: * * *
> Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

The court held that there was no conflict as between these two statutes, and the law of Massachusetts was held to apply.

There is no analogy between this and the case under consideration. In the *McClellan Case* the State statute made void a conveyance in fraud of creditors. The conveyance was made not by a national bank but by a customer of the national bank. In the instant case the statute in question purports to limit or restrict the operations of a Federal agency. It can not be reasonably contended that the decision in either of these cases is authority for the proposition that a State court may determine to what extent a national bank may exercise powers claimed under a Federal statute.

It is significant that the lower court, in discussing the question whether a Federal agency may be interfered with, confines its discussion to the possible effect on the national bank and holds that its decision does not impair the efficiency of a national bank. Does not this overlook the fact that in determining what powers may be exercised by a national bank the Missouri Court assumed powers vested by Congress in the Comptroller of the Currency and in the courts of the United States?

As we have already suggested, a different situation results where an act of Congress expressly authorizes a national bank to exercise a particular power when the exercise of such power is "not in contravention of state or local law." In such case the state court by *quo warranto* proceedings may assume jurisdic-

tion for the purpose of determining whether the exercise of the power in question contravenes any laws of the state. This question was fully considered by this court in the case of *First National Bank* v. *Fellows, Attorney General of Michigan*, 244 U. S. 416. In that case the constitutionality of a provision of the Federal Reserve Act was questioned which provided that—

> The Federal Reserve Board shall be authorized and empowered * * * to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds.

A permit was granted to a national bank in Michigan and the Attorney General of the State instituted proceedings in the nature of *quo warranto* to test the right of a national bank to exercise this power. The Michigan Supreme Court held that the exercise of this power did not contravene the laws of Michigan but that the Act was unconstitutional. On appeal to this court the jurisdictional question was considered, and on this point the court, speaking through Mr. Chief Justice White, said (p. 427):

> The question of the competency of the procedure and the right to administer the remedy sought, then remains. It involves a challenge of the right of the State Attorney General to resort in a state court to proceedings in the nature of *quo warranto* to test the power of

> the corporation to exert the particular functions given by the act of Congress because they were inherently Federal in character, enjoyed by a Federal corporation and susceptible only of being directly tested in a Federal court. * * * But without inquiring into the merits of the doctrine upon which the proposition rests we think when the contention is tested by a consideration of the subject matter of this particular controversy it can not be sustained. In other words, we are of the opinion that as the particular functions in question by the express terms of the act of Congress were given only "when not in contravention of State or local law," *the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground.* (Italics ours.)

In the instant case there is no statute which authorizes the establishment of branches by national banks "when not in contravention of state or local law." In the absence of any such provision, a state law prohibiting the establishment of branch banks can have no application and the opinion of the Court in *Bank* v. *Fellows* is no authority for the proposition that the Attorney General of Missouri and the lower court have power to perform the functions specifically vested in the Comptroller of the Currency and in the courts of the United States.

II.

The Right to establish Branch Banks, or Offices.

As the Court has enlarged the scope of the argument to include the question of the right of a national bank to establish branches, it is incumbent upon the Department of Justice to state its views with reference to this much-vexed question, although I do not apprehend that the Court will find it necessary to consider this branch of the case in this proceeding, for the reasons heretofore given. In the practical operations of government bridges should not be prematurely crossed, either by the Executive or the Judiciary, and the right of a national bank to transact any of its business beyond its usual banking office can, I respectfully submit, be best determined, not as an abstraction or as a question of verbal definition, but if and when a concrete controversy arises between the Comptroller of the Currency, as the supervising director of the national bank system, and a national bank.

Nevertheless, as the Court may possibly prefer to dispose of the controversy, the views of the Department of Justice will be hereinafter stated. They are briefly summarized in a recent opinion of the Attorney General, which is printed as an Appendix to this brief.

The questions here involved may be stated as follows:

(1) Has a national banking association the corporate power to establish and maintain a branch

bank for carrying on a general banking business in conjunction with the parent bank?

(2) If a national banking association has no such corporate power but nevertheless proceeds to establish and operate such a branch bank, what action, if any, may the Comptroller of the Currency take in the premises?

(3) Assuming that a national banking association is without power to establish and maintain a branch bank for carrying on a general banking business, has it the corporate power to open and operate an office or offices at a place or places other than its banking house for such routine services as the collection of deposits and cashing of checks for its customers?

(4) If a national banking association has the corporate power to open and operate such an office or offices, may the Comptroller of the Currency *by regulation* or otherwise *restrict or control* their location, their number, or the functions to be performed thereat?

In this connection it is necessary to consider the following provisions of the Federal Statutes:

Sec. 5133, Rev. Stat.:

> Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five.

Sec. 5134, Rev. Stat.:

> The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state * * * *the place where* its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village. (Italics ours.)

Sec. 5136, Rev. Stat.:

> Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power * * * to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such *incidental* powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits;* by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title. (Italics ours.)

Sec. 5138, Rev. Stat. (as amended by Act of March 14, 1900, c. 45, sec. 10; 31 Stat. 48):

> No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less

than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars.

Sec. 5155, Rev. Stat.:

It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

Sec. 5190, Rev. Stat.:

The *usual business* of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate. (Italics ours.)

Sec. 5239, Rev. Stat.:

If the directors of any national banking association shall knowingly violate, or know-

> ingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Were this a case of first impression, there might be fair ground for argument whether, under Section 5134 of the Revised Statutes and Section 5190 of the Revised Statutes, it was intended to restrict a national bank in "its usual business" to "one banking house in any one place," thereby meaning the geographical locality, whether city, town, or village, in which the national bank has been located.

But this question does not now seem to be open to question. For over fifty years the Executive Department of the Government has consistently held, as a matter of administration, that the "usual business" of a banking association must be transacted in a single and well-defined banking building; and this administrative construction of the law has additional weight, not only because Congress has,

by supplemental legislation, acquiesced in it by passing laws which, in exceptional instances, authorized branch banks, but also because the agitation for the right to have branch banks has been carried on for many years, and, notwithstanding the vigorous attempt to secure legislation which would permit branch banks, Congress has heretofore refused to authorize such branches.

The Attorney General, in an opinion dated May 11, 1911 (29 Op. Atty. Gen. 81), summarizes these conclusions of both the Executive and Legislative branches of the Government as follows (p. 98):

> First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or coordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and
>
> Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

One of the arguments which the Attorney General made against the authority of a national bank to establish a branch bank was the fact of the enactment by Congress on March 3, 1865 (Sec. 5155, Rev. Stat.), subsequent to the enactment of the National Bank Act, of the provision authorizing a State bank having branches to retain such branches after having been converted into a national banking association. He

contended that this legislation would have been unnecessary if a national bank already had the power to establish a branch. This section as here quoted below has a further bearing upon the definition of a branch bank.

Section 5155, Rev. Stat.:

> It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

A branch bank, therefore, as the term is used in the National Bank Act, by the Attorney General, and by the office of the Comptroller of the Currency, is an institution partaking of the nature of a primary organization. To it may be allocated a proportionate share of the capital stock and the extent of its business is governed by the amount of such allocation. It has an organized personnel. In the officers at the branch there is vested the same character of authority, responsibility, and discretion as is vested in the officers at the parent bank. In so far as its practical operations are concerned, it is a complete substitute for a local bank in the locality

which it serves. It engages in a general banking business in conjunction with and subordination to, the parent bank. Practically a branch bank is in many respects a partly autonomous unit separately housed in its own banking house. It is to many intents and purposes an additional bank under the same board of directors, closely associated with the parent bank, but operating in most matters independently.

Considering Section 5190, Revised Statutes, in the light of the above definition, the "banking house" is the legal domicile of the bank from which its discretionary powers are exercised and in which its policies are formulated and approved. If a national banking association established a branch bank or banks it would be transacting its banking business at more than one banking house. It would in effect be operating more than one bank. This power to multiply banking offices the law as interpreted for many years has consistently denied, and the refusal of Congress to authorize branch banking, as generally allowed in England and France, leaves no doubt as to the policy of the law.

If, therefore, a national bank should attempt to establish and operate a branch bank, such action could be treated by the Comptroller as a violation of Section 5190, Revised Statutes. His remedy would be to invoke Section 5239, Revised Statutes, by bringing suit in his own name for forfeiture of charter of the bank.

But the question still remains, can a national bank transact in this age of the telephone and telegraph no business whatever beyond the four walls of its office building? Is it "cribbed, cabined, and confined" to one small place? May it not have "service stations" for minor and routine purposes? If the answer is "No," how can it clear its checks in the Clearing House? The answer is to apply the rule of reason, which governs all legislation expressed with the limitations of language.

The words "the usual business" as used in this section can not be given a strictly literal interpretation. It was never intended by the National Bank Act that all of the business of a national banking association should be conducted within the four walls of a single building. Much of the routine business of every bank must be transacted away from the banking house. This has always been the case, although the character of business so conducted has changed from time to time to meet the changing economic and social conditions and the consequent development of banking practice. The business of banking, like every other established human enterprise, is continually in process of growth and adjustment.

This portion of Section 5190, Revised Statutes, must, therefore, be construed in connection with that portion of Section 5136, Revised Statutes, which provides that the board of directors of a national banking association may exercise all such incidental powers as shall be necessary to carry on the busi-

ness of banking. It has been found necessary for the banks to transact some of their business on the outside of their banking houses. Must they do so on the open highway or on the curb? May they not have an office or building? For the purpose of illustration, a few examples may be mentioned.

National banking associations in the larger cities are members of clearing-house associations, an organization through which considerable routine banking business is transacted. The representatives or agents of the national banks go to these clearing houses each day for the purpose of clearing checks which they hold upon other banks. National banks also have correspondent banks in various cities to whom and from whom exchanges, remittances, and collections are sent and received; the national banks thus receive and pay out money at places other than their banking houses. National banks participate in syndicate loans made at a place other than their banking houses. They also have agents to travel to represent the bank in an advertising capacity or in soliciting business. National banks may also have efficiency experts whose duties take them to various places in order that they may obtain first-hand information as to the management and appraisal of the business of various manufacturing plants or of other corporations who have, or are applicants for, loans. National banks, upon occasion, send agents out to inspect farms as a basis for real-estate loans and to collect rents in towns and cities. National banks also send agents to public sales in which they are interested;

they sometimes send agents to county seats to bid in property being sold at auction which they hold as security. They frequently send out their notary public to take acknowledgments, to write deeds, mortgages, etc., where the makers are unable to visit the bank. National banks employ attorneys to represent them in legal transactions and proceedings outside of their banking houses. National banks redeem their circulating notes in the Treasury at Washington. The messengers of national banks are sent out from the banking houses on errands as business may require.

It has never been contended that national banks in conducting business of the character above enumerated violate Section 5190, Revised Statutes, because the business was carried on at places other than their banking houses. In the light of modern banking practice a narrow and literal construction of this section is unworkable. The construction must be made with the practical situation in mind.

In this connection it is pertinent to quote from the opinion of the Supreme Court in *Merchants Bank* v. *State Bank* (10 Wall., 604, 651):

> *The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably.* The business of every bank away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have

> been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy and inseparable from it. There is no force in this objection.

This construction of Section 5190, Revised Statutes, by this Court has an added significance in view of the fact that the transactions involved in this suit took place in 1867, only three years after the approval of the National Bank Act.

The exercise of powers, like those above mentioned, are clearly incidental powers of a national bank. In his opinion of 1911, the Attorney General drew a sharp distinction between the powers of a branch bank and the exercise of such incidental powers by a national bank. After citing *Bank of Augusta* v. *Earle* (13 Pet. 519), *Tombigbee Railroad Co.* v. *Kneeland* (4 How. 16), *City Bank of Columbus* v. *Bexch* (Fed. Case No. 2736), the Attorney General said (29 Op. 86):

> Many cases might also be cited wherein it has been held that banking corporations have the power to establish clearing-house agencies.
>
> These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business.

And further (Op. 87, 88):

> These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.
>
> That such a distinction does exist in fact is obvious.
>
> An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution.

And again (Op. 91, 92):

> As said in *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 127, in referring to Section 5136, Revised Statutes:
>
> "Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently." Yet the power to establish a branch bank is certainly in no respect essential to the discounting and negotiating of promissory notes,

drafts, bills of exchange, and other evidences of debt, or of exercising either or any of the incidental powers named in the statute, or of any power which is incident to the carrying on of a general banking business.

The operations of a national banking association may be divided into two general classes:

(*a*) Those which must be performed by the board of directors; and

(*b*) Those which must be delegated to and performed by the officers, agents, or servants of the bank.

These powers may be again divided into those which require discretion, judgment, and banking experience, and those which are ministerial, clerical, and of routine character.

The powers performed by the board of directors may be described as discretionary powers, while those performed by officers, agents, or servants may be referred to as ministerial powers.

The revenues of a bank are derived primarily from (1) the investment of its funds, which consist of its capital stock subscriptions, surplus or accumulated profits, and its deposits; (2) loan of its credit in the form of acceptances; and (3) fees and commissions received in the exercise of fiduciary powers.

In the exercise of these powers full responsibility rests upon the board of directors of the association to see that the restrictions and limitations of the National Bank Act are fully complied with. The responsibility of supervising all such transactions is

vested in the board and this responsibility can not be evaded by delegation of these powers.

To illustrate: If a national bank makes a loan in excess of the amount permitted by Section 5200, Revised Statutes, or in any other respect violates the provisions of the National Bank Act, under Section 5239, Revised Statutes, "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation." This section specifically provides that—

> If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all of the rights, privileges, and franchises of the association shall be thereby forfeited.

It will be observed that under the terms of the National Bank Act all of the powers of the national bank are vested in its board of directors, and the board is authorized, *inter alia*, to appoint officers and agents, to remove them at will, to fix their compensation, and to adopt by-laws for the general conduct of the banking business. The responsibility for the management and control of the affairs of the bank is, therefore, definitely vested in the board of directors, and the services performed by officers or agents must be performed under the direction of and by delegation of authority from

the board of directors. This being true the discretionary powers of the board can not be delegated and must, therefore, be exercised only at the banking house.

On the other hand, the actual receipts of deposits, payment or certification of checks, the actual payment of money on loans authorized by the board, and other purely ministerial acts of necessity must be performed by officers or agents.

These acts, while usually performed by officers or agents at the banking house, are sometimes necessarily performed by correspondents or agents elsewhere. Money deposited at the banking house is received by the receiving teller, an agent or employee of the bank. Money received in payment of checks, drafts, or other items collected by the bank is received by correspondents or agents of the bank elsewhere than at the banking house. The receiving teller and the correspondent bank are both agents of the bank. In an age, which has defied space, all business can not be restricted to one place.

It reasonably follows that if a national bank has the incidental power to perform these administrative functions through its agents or servants, acting when necessary outside of its banking house, the bank may also, *if necessary*, maintain an office or offices—as distinguished from a branch—at a place other than its banking house. Such offices are service stations, or minor facilities, necessitated by the conditions of our highly complex civilization.

When does the exercise of an incidental power by a national bank become reasonably necessary? The answer to this question involves a consideration of the conduct of the banking business at any given time and place.

It is quite clear that a national bank receives deposits and cashes checks through the exercise of its incidental powers under the National Bank Act. It is, perhaps, the simplest and oldest form of banking service. It involves little discretion. It is almost wholly clerical. In the past national banks have been able to render for its customers in the city in which they were located this service almost exclusively within the four walls of its banking house. But they now face new conditions. For example, the rapid growth of modern city populations in recent years has resulted in congestion of traffic in the downtown districts and in the development of residential sections at remote distances from the banks. The extensive use of the automobile as a means of transportation by individuals has been a large factor in creating these conditions. To accommodate distant customers the need is strongly felt in many localities for the banks to maintain an office or offices at some distance from their banking houses for the purpose of receiving deposits and cashing checks.

This situation has been met in about one-half of the States through legislation or rules and regulations by means of which the State banks are permitted thus to extend their services beyond the four

walls of their banking houses. A new development in banking practice has thus been instituted in a number of cities by the State banks, and it is not unreasonably claimed by many national banks, especially in the large cities, that a similar privilege should be given them to permit competition. The necessity is in the economic situation, while the immediate and practical necessity is due to the new banking practice by the State banks. The national banks must be allowed to compete or suffer a serious loss in business and prestige. Did Congress contemplate a policy of unreasonable restriction, which might undermine the national banking system in the large centers of population?

III.

The Authority of the Comptroller.

I come now to the question of the authority of the Comptroller, by regulation or otherwise, to supervise within reasonable limits the location of, the number of, or the functions to be performed at such office or offices.

In *Studebaker* v. *Perry* (184 U. S. 258), where his authority to make more than one assessment upon the shareholders of a national banking association was brought into question, the Court said (p. 262):

> The logic of the plaintiff in error requires him to convince us that his voluntary payment of one assessment, made when the Comptroller was imperfectly acquainted with the amount of the bank's indebtedness, amounts

> to a satisfaction *in toto* of his obligation. Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language. The inconveniences that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

Let me briefly summarize the principal powers and duties given to the Comptroller of the Currency by the National Bank Act as amended. The Comptroller is charged by the Act with the execution of all laws relating to the issue and regulation of the national currency; he must approve the name of each association, and no association can commence the business of banking without authorization from him; he may make rules and regulations under which certain national banks may act as fire or life insurance agents; national banks operating foreign branches are required to furnish him, upon demand, information as to the condition of such branches; he is required to approve the change of the name of a national bank or the change of its location to another place in the same state; he approves increases and decreases of capital stock; in case of a deficiency of 20 per cent or more in the surplus of a national bank, he may compel the bank to close its doors; he approves the conversion of State into

national banks; he notifies national banks of the impairment of capital stock; regular (and special, if required) reports of condition must be made to him by all national banks, also reports of dividends; reports of voluntary liquidation must be made to him; he is required to approve the consolidation of national banks; when he becomes satisfied of the insolvency of a national bank he may forthwith appoint a receiver who shall under his supervision wind up the affairs of the bank; he appoints examiners who are required to examine each national bank at least twice each year and to report their findings to him; he may in his discretion require special examinations.

It will readily be seen from the above that the specific supervisory control of the Comptroller over the national banking system covers a wide field, and requires for its effective exercise a very broad discretion.

On this point the Supreme Court in *Cook County Nat. Bank* v. *United States* (107 U. S. 445, 448) said:

> We consider that act [the National Bank Act] as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their

notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

While the Comptroller may no doubt, as an incident to some of the above-enumerated powers, exercise a measure of control over the establishment of such offices or agencies, his authority in this respect rests upon a much broader basis. He is authorized by Section 5239, Revised Statutes, to bring suit for the forfeiture of the charter of any national banking association whenever, in his judgment, it has violated any of the provisions of the National Bank Act. This provision of itself establishes the position of the Comptroller of the Currency as the practical administrator of the National Bank Act. It is the intent of this provision, construed in connection with the other provisions of the act, that the Comptroller should at all times maintain a watchful supervision over the national banks for the purpose of seeing that they conduct their business within the requirements of the law. This power is emphasized by the further fact

that a national bank has no powers except those derived from the national banking laws.

For the past fifty-nine years, in the practical administration of the national banks, the Comptroller has attained a position in which his authority of general supervision over the national banks is well recognized. This power may not in all respects be specifically given by the express language of statutory enactment, but has as a logical consequence and as an inevitable implication grown out of the exercise of various statutory responsibilities and duties imposed upon him and especially from his general authority to bring suit for forfeiture of charter against any national bank which, in his judgment, may be in violation of the National Bank Act.

In the Agricultural Credits Act of 1923 (c. 252, sec. 209 (a), 42 Stat. 1467) Congress clearly recognized and affirmed this status of the Comptroller by the following language:

> The Comptroller of the Currency shall exercise the same *general power of supervision* over such corporations as he *now exercises over national banks* organized under the laws of the United States.

While it is not contended that the Comptroller could cite this new language as authority for unlimited, much less arbitrary, supervision over the national banks, nevertheless it clearly indicates that the general supervision which he has heretofore exercised and now exercises over the national banks,

as a practical outgrowth of the administration of the National Bank Act, has been a legal exercise of his discretionary authority.

This case does not require the Department of Justice to express any opinion as to whether the establishment of branch offices rests wholly in a given case in the discretion of the Comptroller of the Currency. He unquestionably has a supervisory power to see that the bank does not exceed its powers in transacting its "usual business" beyond the walls of its main office. Presumptively all its "usual business" must be transacted in such main office. No bank can transact any business beyond its main office unless in the conditions of the banking business there is plainly a justification therefor, and, *a fortiori*, it can not maintain a branch office unless there is the same clear warrant. The Comptroller of the Currency, in the exercise of his supervisory power to keep the operations of national banks within their charter powers, clearly has the right to determine, from investigation and otherwise, whether a national bank is maintaining a "branch bank" as distinguished from a "branch office," and, if satisfied that the outside business office is essentially a "branch bank," he is authorized to proceed in the courts of law to require such bank to abandon its branch under the penalty of a forfeiture of its charter.

This administrative power, however, does not necessarily imply a discretionary power on the part of the

Comptroller to permit one bank to have a branch office and to deny it to another, or to permit one locality to have branch offices and to deny them to another. If, as I have argued, a national bank may conduct its minor and routine operations, when necessary, beyond the walls of its place of business, it may be a right which the bank has as a part of its charter and not dependent upon any discretionary permission of the Comptroller. It is not necessary in this case or in this brief to discuss this grave question of power. The reference is only made to exclude any implication that it is the opinion of the Department of Justice that the Comptroller of the Currency may finally decide in the case of each bank whether he will or will not permit it to have a branch office. In this connection it is significant that the question of excesses of corporate power is to be determined in a judicial proceeding instituted by the Comptroller.

In any event the Comptroller of the Currency, in his duty of compelling national banks to act within their corporate powers, has supervisory discretion; and this important duty emphasizes again the first point of our brief, upon which the Government mainly relies, that a State may not, in a *quo warranto* proceeding, interfere with the exercise of such discretion. If the State of Missouri may, in this proceeding, call the First National Bank in St. Louis to account for transacting its business beyond the walls of its main office, then the Attorney General of every State has a like privilege. It would follow that the

whole national banking system could be thrown into confusion by the divided counsels of Federal and State authorities. That which the Comptroller of the Currency might regard as reasonably within the charter powers of a national bank might be regarded by the Attorney General of a State as in excess of such powers.

Our system of Government does not contemplate such a confusion of authority. If the First National Bank in St. Louis, whose incorporation by the Federal Government is undisputed, has exceeded its charter powers by maintaining branch banks, the question then concerns the Federal Government—the sovereign which created the Bank. Primarily, the restriction of the Bank to its charter powers is, as a question of administration, between the Comptroller of the Currency and the Bank, and if the question can not thus be adjusted in the practical workings of the Government, then it becomes a question for the Federal Judiciary, in a suit properly brought by the Comptroller of the Currency, to determine whether the Bank has acted in excess of the powers granted to it by the Federal Government.

For these reasons the judgment of the court below should be reversed and this suit should be dismissed.

Respectfully,

JAMES M. BECK,
Solicitor General.

GEORGE ROSS HULL,
CHARLES W. COLLINS,
Of Counsel.

OCTOBER, 1923.

OPINION OF ATTORNEY GENERAL.

DEPARTMENT OF JUSTICE,
Washington, October 3, 1923.

SIR: I have your letter of August 30, 1923, requesting my opinion on the power of national banking associations to open and operate offices at places other than their banking houses for the performance of such routine services as the receipt of deposits and cashing of checks for their customers. You request to be advised whether:

> (1) Assuming that a national banking association is without power to establish and maintain a branch bank for carrying on a general banking business, has it the corporate power to open and operate an office or offices at a place or places other than its banking house, for the performance of such routine services as the collection of deposits and cashing of checks for its customers?
>
> (2) If a national banking association has the corporate power to open and operate such an office or offices, must they be located within the city limits of the place designated in the organization certificate of the association as the place where its operations of discount and deposit would be carried on?

The statutes relating to national banking associations, so far as they are material to our present inquiry, are Sections 5133, 5134 (Par. 2), 5136 (Pars. 6 and 7), and 5190, R. S. The material parts of said statutes read as follows:

> "SEC. 5133. Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which

the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs."

"SEC. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

* * * * *

Second. The place where its operation of discount and deposit are to be carried on, designating the State, Territory or district, and the particular county and city, town or village.

Sec. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which the stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of this Title.

> "Sec. 5190. The usual business of such national banking associations shall be transacted at an office or banking house located in the place specified in its organization certificate."

The provisions of Section 5190 R. S., as to the place at which the usual business of the bank shall be transacted refers to the city or town in which the bank is located and not the particular place within the city. McCormick v. Market Nat'l Bank, 165 U. S. 538, 549.

National banks have only those powers specified in the National Banking Acts, and such other powers as are necessarily incidental thereto. McBoyle v. Union Nat'l Bank, 122 Pa. 458; First Nat'l Bank v. Nat'l Exchange Bank, 92 U. S. 122, 127; Logan Co. Nat'l Bank v. Townsend, 139 U. S. 67, 73; Bullard v. Bank, 18 Wall. 589, 593.

In Bullard v. Bank, supra, the Supreme Court said:

> "The extent of the powers of national banking associations is to be measured by the Act of Congress under which such associations are organized."

In Logan Co. Nat'l Bank v. Townsend, supra, the Court said:

> "It is undoubtedly true, as contended by the defendant, that the National Banking Act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

It is to be observed that Section 5190, R. S., relates to the "usual business" which, in my opinion, is to be construed the general banking business usually conducted by national banks. There is no

statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the association.

In my opinion, a national banking association may establish in the city or place designated in its certificate of organization an office or offices for the transaction of business of a routine character, which does not require the exercise of discretion, and which may be legally transacted by the bank itself. It may not, however, establish a branch bank to do a general banking business such as is usually done by national banks. The establishment of such a branch would be illegal and subject the offending bank to the forfeiture of its charter. 29 Op. 81.

It seems to be the intent of the National Banking Act that the business of banking ordinarily transacted by a national banking association shall be performed in the city or place designated in its organization certificate.

It has been held that a national bank cannot make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank. Armstrong v. Second Nat'l Bank, 38 Fed. 883, 886.

While national banking associations may exercise all the powers expressly given them by the statute, and such additional powers as may be necessary to carry on the business of banking, the manner in which the powers may be exercised are subject to the supervision of the Comptroller of the Currency. Should the Comptroller, in the exercise of his supervisory powers over national banks, ascertain that the directors or officers have knowingly violated, or are violating, the national banking laws, he may proceed against such association, its

officers and directors as provided by Section 5239, R. S., which reads as follows:

> "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Answering your specific questions I have the honor to advise you as follows:

First. National banking associations have the power to open and operate offices at places other than their banking houses, within the place specified in their organization certificate, for the performance of such routine services as the receipt of deposits and the cashing of checks for their customers.

Second. National banking associations have no authority to open offices for the purpose of receiving deposits, paying checks, etc., outside of the limits of the city or place designated in the organization certificate as the place of its operations of discount and deposit.

Respectfully,

H. M. DAUGHERTY,
Attorney General.

The Honorable,
The SECRETARY OF THE TREASURY.

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